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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

Number 81

UNITED STATES OF AMERICA,
Appellant,
vs.
GEORGIA PUBLIC SERVICE COMMISSION,
Appellee.

MOTION

To Affirm the Judgment of the United States District Court for the Northern District of Georgia

and

APPELLEE'S BRIEF

Supporting the Motion to Affirm the Judgment of the United States District Court for the Northern District of Georgia.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

Number 794.

UNITED STATES OF AMERICA,
Appellant,

vs.

GEORGIA PUBLIC SERVICE COMMISSION,
Appellee.

MOTION TO AFFIRM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the Georgia Public Service Commission, the appellee herein, and pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves the Court to affirm the judgment from which the appeal in the above-entitled cause purports to have been taken, on the ground that it is manifest that the questions on

which the decision of the cause depends are so unsubstantial as not to need further argument.

This, the 11th day of April, 1962.

.....

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

Number 794.

UNITED STATES OF AMERICA,
Appellant,

vs.

GEORGIA PUBLIC SERVICE COMMISSION,
Appellee.

APPELLEE'S BRIEF SUPPORTING THE MOTION TO AFFIRM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

PREFACE.

The Jurisdictional Statement in this case was filed with the Clerk of the Supreme Court on March 15, 1962, and copies of same were received by the Georgia Public Service Commission on March 16, 1962.

II.

OPERATIVE FACTS.

On July 15, 1960, a Regional Director employed by the General Services Administration was requested by the United States Department of Public Health, Communicable Disease, Center of Atlanta, Georgia, to negotiate with carriers for the establishment of economical rates and charges to cover a mass movement of household goods and personal effects of civilian employees of such Communicable Disease Center on transfer from Savannah, Georgia, to Atlanta, Georgia, and vicinity.[1]

On July 27, 1960, the Regional Director invited fifty-four carriers to submit bids for such movement.[2] In response to this invitation thirteen motor carriers submitted timely bids.[3] Eight motor carriers quoted rates as published in a tariff filed with and approved by the Georgia Public Service Commission, and the other five motor carriers, including Consolidated Van & Storage Companies, Inc., submitted bids based on rates lower than those published in such tariff.[4]

Upon evaluating the bids, the Regional Director determined that Consolidated was the lowest responsive bidder and the award by contract was made to such motor carrier on August 5, 1960.[5]

Subsequently, the Georgia Public Service Commission advised Consolidated, and the other four motor carriers who bid lower than the rates published in such tariff, that

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[1] Record, p. 13, 2d par., p. 27, 3d par.

[2] Record, p. 13, 1 par.

[3] Record, p. 14, 1st par., p. 17

[4] Record, p. 14, 1st par.

[5] Record, p. 14, 2d par., 3d par.

should they perform at the rates quoted the Regional Director, they would be in violation of the Commission's rules and subject to having their intrastate operating certificates revoked.[6] By letter dated August 23, 1960, Consolidated advised the Regional Director that it would be unable to perform the services under the contract awarded August 5, 1960.[7]

Later, the Regional Director procured the movement of such household goods and personal effects at charges assessed and collected by a motor carrier pursuant to rates published in a tariff filed with and approved by the Georgia Public Service Commission.[8]

The above rates paid by the United States were prescribed by a household goods commodity tariff filed with and approved by the Georgia Public Service Commission.[9] Household goods are a frequent item of transportation and, consequently, it is the general practice of governmental agencies regulating such transportation to adopt or approve commodity rates for household goods. Practically speaking, no household goods move at the higher class rates.

We should note that the household goods and personal effects involved in such movement constitute private property owned and used by civilian employees of the Federal government and do not constitute property owned or used by the Federal government. The movement originated from the private dwellings of such civilian employees at Savannah, Georgia, and terminated at their private dwellings in Atlanta, Georgia, and vicinity. Consequently, the movement did not involve an area under the exclusive

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[6] Record, p. 14, 2d par.

[7] Record, p. 14, 3d par., p. 20.

[8] Record, p. 27, 3d par., p. 28.

[9] Record, p. 28, 9th line from top.

jurisdiction of the Federal government, nor did it involve an area rented, leased or otherwise held by the Federal government. Furthermore, such movement was wholly intrastate.

III.

CONTENTIONS OF THE PARTIES.

The United States contends that, by virtue of the Federal Statutes and Regulations referred to in Appendix B of the Jurisdictional Statement, Sections 68-613, 68-614 and 68-9911 of the Code of Georgia of 1933 are unconstitutional insofar as they confer upon the Georgia Public Service Commission the power to regulate the rates in contracts entered into by the United States with motor carriers for the movement of the household goods and personal effects owned by civilian employees of the United States Department of Public Health, when such movement is in intrastate commerce within the State of Georgia. The United States claims that the economic burden imposed upon it by State regulation is a direct interference with its activities.

The Georgia Public Service Commission contends to the contrary, and claims that the economic burden imposed upon the United States is indiscriminate and incidental.

The United States in its contention places chief reliance on *Public Utilities Commission of the State of California v. United States*[10] and the Georgia Public Service Commission in its contention places chief reliance on *Penn Dairies, Inc., and the United States v. Milk Control Commission of the Commonwealth of Pennsylvania.*[11]

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[10] (1958), 355 U. S. 534, 2 L. ed. 2d 470, 78 S. Ct. 446, reh. den. 356 U. S. 925, 2 L. ed. 2d 760, 78 S. Ct. 713.

[11] (1943), 318 U. S. 261-284, 87 L. ed. 748-761, 63 S. Ct. 617-628.

IV.

THE STATUTES RELIED UPON BY THE UNITED STATES, AS APPLIED TO THE FACTS IN THIS CASE, REQUIRE THAT THE METHOD OF ARRANGING RATES BE ACCOMMODATED TO THE EXISTING STATE REGULATORY FRAMEWORK.

The United States relies upon certain provisions of the Administrative Expenses Act of 1946,[1] the Carrier Compensation Act of 1949,[2] the Federal Property and Administrative Services Act of 1949[3] and an Act of 1956 revising certain Armed Services Procurement provisions,[4] all of which have been amended several times.

Initially, we should note that none of these statutes expressly provide for the immunization of the procurement activities of the Federal government from State rate regulation, irrespective of the fact that all of the statutes were enacted subsequent to *Penn Dairies*, but prior to *Public Utilities*. Under analogous circumstances, this Court held in *Penn Dairies* that "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous."[5]

We should also recognize that the statutes were enacted in an atmosphere of government regulation of business

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[1] 60 Stat. 806, as amended, 5 U. S. C. 73b-1.

[2] 63 Stat. 802, 814, as amended, 37 U. S. C. 253 (c).

[3] 63 Stat. 377, 383, 393, as amended, 40 U. S. C. 481, 41 U. S. C. 251-260.

[4] 70A Stat. 1, 127, as amended, 10 U. S. C. 2301-2314.

[5] 318 U. S. 275, 1st par., 87 L. ed. 756, 1st col., 2d par. See also: *Graves v. New York* (1939), 306 U. S. 466, 479, 2d par., 83 L. ed. 927, 932, 2d col., 2 par.

which widely involved direct price fixing by legislative enactment by both the Federal and State governments, for the purpose of stabilizing and stimulating various segments of the economy.

We should note that a provision of the Administrative Services Act of 1949,[6] relied on by the United States, provides in part as follows:

> (a) The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned—
>
> . . . .
>
> (4) *with respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal and State regulatory bodies;* Provided, That the Secretary of Defense may from time to time, and unless the President shall otherwise direct, exempt the Department of Defense from action taken or which may be taken by the Administrator under clauses (1)-(4) of this subsection whenever he determines such exemption to be in the best interests of national security. (Emphasis supplied.)

Obviously, this provision demonstrates the Congressional intent not to immunize the Federal government from State price fixing in its procurement activities, because otherwise there would be no need for the Administrator to represent Federal agencies in proceedings before State regulatory bodies. We should also note that the

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[6] 63 Stat. 384, 40 U. S. C. Sec. 481. Jurisdictional Statement, p. 33.

only exemption provided by the Congress is in the case of the Department of Defense when the interests of national security are involved.

Another provision of the Administrative Services Act of 1949 provides that "It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small-business concerns."[7] A virtually identical provision is contained in the Act of 1956 revising certain Armed Services Procurement provisions.[8] These provisions demonstrate a Congressional intent to subjugate the interest in the economical procurement of supplies and services to the higher interest in stabilizing and stimulating the national economy.

It is well established that administrative regulations which exceed statutory delegations of authority are invalid.[9]

Manifestly, the Congress in enacting these statutes did not intend the obtainment of unregulated rates, but the accommodation of the method of arranging rates to the existing State regulatory framework. Had its purpose been merely to insure low rates, it could easily have declared that competitive bidding for government contracts should be unaffected by State regulation.

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[7] 63 Stat. 393, Sec. 302 (b), 41 U. S. C., Sec. 252 (b).

[8] 70A Stat. 127, 10 U. S. C., Sec. 2301.

[9] *Manhattan General Equipment Co. v. Commissioner of Internal Revenue* (1936), 297 U. S. 129, 80 L. ed. 528; *Waite v. Macy* (1918), 246 U. S. 606, 62 L. ed. 892; *United States v. United Verde Copper Co.* (1905), 196 U. S. 207, 49 L. ed. 449; *Morrill v. Jones* (1883), 106 U. S. 466, 27 L. ed. 267.

V.

GEORGIA CRIMINAL STATUTE IS NOT APPLICABLE TO FEDERAL OFFICERS.

Section 68-9911 of the Code of Georgia provides as follows:

> 68-9911. Motor common carrier regulations, violation of.—Every officer, agent, or employee of any corporation and every person who violates or fails to comply with the provisions of Chapter 68-6 relating to the regulation of motor common carriers, or any order, rule, or regulation of the Public Service Commission, or who procures, aids, or abets therein, shall be guilty of a misdemeanor. (Acts 1931, pp. 199, 208.)

The United States contends that this criminal provision is unconstitutional because of its applicability to Federal officers.

In the lower Court, the United States did not attack this Code Section specifically or raise the criminal statute facet of this case. Consequently, the Georgia Public Service Commission was afforded no fair opportunity to place in evidence an affidavit to the effect that the Code Section has never been utilized in the prosecution of a shipper or an agent acting on behalf of a shipper. The Courts of Georgia accord great weight to the administrative interpretation of statutes,[1] and strictly construe criminal stat-

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[1] *Mathis v. Fulton Industrial Corp.* (1929), 168 Ga. 719, 722, 1 par., 149 S. E. 35; *Carroll v. Wright* (1908), 131 Ga. 728, 736 (4), 63 S. E. 260; *Temple Baptist Church v. Georgia Terminal Co.* (1907), 128 Ga. 669, 680, 58 S. E. 157; *Epping v. City of Columbus* (1903), 117 Ga. 263 (7), 273, 43 S. E. 803; *Miller v. Wilson* (1879), 60 Ga. 505; *Solomon v. Commissioners of Cartersville* (1870), 41 Ga. 157, 161, 2d par.; *Richardson v. Maryland Casualty Co.* (1930), 41 Ga. App. 520, 525, 3d par., 153 S. E. 524; *Board of Education v. Bacon* (1918), 22 Ga. App. 72, 78, 2d par., 95 S. E. 753; *Griner v. Baggs & Perry* (1908), 4 Ga. App. 232 (3a), 235, 1st par., 61 S. E. 147.

utes against the State.[2] Hence, the attack comes too late at this stage of the litigation.

Furthermore, Code Section 68-9911 shows on its face its inapplicability to shippers and their agents. Several cases of this Court are apposite to such interpretation.

In *United States v. Farrar*,[3] this Court held that the ordinary purchaser of intoxicating liquor fit for beverage purposes, not belonging to that class of persons who are authorized to sell, purchase or otherwise deal with such intoxicating liquor, was not subject to prosecution under Section 6 of the National Prohibition Act for purchasing liquor without a permit. This Court commented upon the justification for such a construction by stating that "Probably it was thought more important to preserve the complete freedom of the purchaser to testify against the seller than to punish him for making the purchase."[4] This Court reached a similar conclusion in *Gebardi v. United States*[5] involving the prosecution of a woman under the Mann Act. In *Nigro v. United States*[6] the Court held on the same rationale that the evidence was insufficient to support a conviction under the Harrison Anti-Narcotic Act of a retail purchaser of narcotics for his own use. The Court achieved a similar result in *United States v. Boyle*[7] involving a prosecution under a Federal conflict

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[2] *Matthews v. Everett* (1947), 201 Ga. 730, 735, 2d par., 41 S. E. 2d 148; *Wood v. State* (1942), 68 Ga. App. 43 (a), 21 S. E. 2d 915.

[3] (1930), 281 U. S. 624, 74 L. ed. 1078, 50 S. Ct. 425, 68 A. L. R. 892.

[4] Id., 281 U. S. 634, 2d par., 74 L. ed. 1081, upper r. col.

[5] (1932), 287 U. S. 112, 119, 1st par., 77 L. ed. 206, 209, upper r. col.

[6] (C. C. A.—8th—1941), 117 F. 2d 624, 628 (1).

[7] (D. C.—D. Maine—1958), 138 F. Supp. 237, 251 (9).

of interest statute, of a person who gave compensation to a Federal employee.

Georgia Code, Section 68-9911, bears a sharp contrast to Sections 2107, 2110, 2111 and 2112 of the California Public Utilities Code, set forth in the Appendix of this Brief. These California criminal provisions were considered in *United States v. Public Utilities Commission of the State of California*[8] and in *Public Utilities Commission of the State of California v. United States*.[9] These provisions are far more extensive than Georgia Code, Section 68-9911. For instance, the penalties provided by Section 2112 were applicable to every offender whether acting individually or as an officer, agent or employee of a non-utility corporation. The breadth of such a provision would clearly include an offending shipper.[10] On the other hand, the Georgia statute obviously lacks such breadth and sophistication of coverage.

In any event, it seems clear that a State criminal statute would have no applicability to a Federal officer in the performance of his official duties. Even if a State should attempt to so apply such a statute, there would be time enough to properly dispose of such an attempt.

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[8] (D. C.—N. D.—Cal.—1956), 141 F. Supp. 168.

[9] (1958), 355 U. S. 534, 2 L. ed. 470, 78 S. Ct. 446, reh. den., 356 U. S. 925, 2 L. ed. 2d 760, 78 S. Ct. 713.

[10] Id., 355 U. S. 538, 2d par., 2 L. ed. 2d 474, r. col. 2d par.

VI.

ANALYSIS OF PENN DAIRIES AND KINDRED DECISIONS REVEAL THAT THE IMPOSITION BY A STATE OF AN INDISCRIMINATE AND INCIDENTAL BURDEN UPON THE UNITED STATES DOES NOT CONTRAVENE ITS IMPLIED IMMUNITY.

In *Penn Dairies* this Court was confronted with the following facts. The State of Pennsylvania established the Pennsylvania Milk Control Commission with authority to fix minimum wholesale and retail prices for milk sold within the State wherever produced. The Federal government established a military encampment within the State on land leased from the State and subject to its jurisdiction. The Army invited bids for a supply of milk. The Commission sent a notice to all milk dealers interested in submitting bids, including the appellant, of the minimum wholesale prices to be charged. The appellant submitted a bid at prices below the prescribed minima. The bid was accepted and the contract performed. Subsequently, the Commission issued a citation to the appellant to show cause why its application for a renewal of its license should not be denied because of its violation of the Commission's minimum price order. After a hearing, the license application was denied. In an appeal to the Court of Common Pleas, the Federal government was granted leave to intervene, and it continued as a party in all subsequent proceedings in the case.[1] The Commission's order was sustained by the Superior Court and Supreme Court of Pennsylvania. On appeal, this Court held that the judgment be affirmed because the Commission had such authority under the police power of the State and the exercise thereof did not place an unconstitutional burden on the

[1] Id., 318 U. S. 266, 1 par., 87 L. ed. 752, 1 col., 2d par.

Federal government or interfere with its policy of competitive bidding.[2] The Federal procurement statutes and regulations construed by this Court in *Penn Dairies* are analogous to those referred to in Appendix B of the Jurisdictional Statement.

The ratio decidendi of the majority opinion in *Penn Dairies* is tailor-made for the operative facts of the case sub judice as is evidenced by the following excerpt:

> We[3] may assume also that, in the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. *Ohio v. Thomas*, 173 U. S. 276, 43 L. ed. 699, 19 S. Ct. 453; *Johnson v. Maryland*, 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16; *Hunt v. United States*, 278 U. S. 96, 73 L. ed. 200, 49 S. Ct. 38; *Arizona v. California*, 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522. But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions, *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 524, 525, 70 L. ed. 384, 392, 393, 46 S. Ct. 172; *James v. Dravo Contracting Co.*, 302 U. S. 134, 149, 82 L. ed. 155, 166, 58 S. Ct. 208, 114 A. L. R. 318; *Buckstaff Bath House Co. v. McKinley*, 308 U. S. 359, 362, 363, 84 L. ed. 322, 324, 325, 60 S. Ct. 279, and cases cited; cf. *Susquehanna Power Co. v. State Tax Commission*, 283 U. S. 291, 294, 75 L. ed. 1042, 1045, 51 S. Ct. 434; *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, 385, 386, 82 L. ed.

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[2] See also: *Rohrer v. Milk Control Board* (1936), 322 Pa. 257, 186 A. 336; *Milk Control Board v. Gosselin's Dairy* (1938), 301 Mass. 174, 16 N. E. 2d 641; *Paterson Milk & Cream Co. v. Milk Control Board* (1937), 118 N. J. L. 383, 192 A. 838.

[3] Id., 318 U. S. 269, 2d par., 87 L. ed. 753, 1. col., last par.

907, 913, 914, 58 S. Ct. 623, and the mere fact that nondiscriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government for state taxation or regulation. *Alabama v. King & Boozer*, 314 U. S. 1, 9, 86 L. ed. 3, 6, 62 S. Ct. 43, 140 A. L. R. 615; and cases cited; *Baltimore & A. R. Co. v. Lichtenberg*, 176 Md. 383; 4 A. (2d) 734, s. c.; *United States v. Baltimore & A. R. Co.*, 308 U. S. 525, 84 L. ed. 444, 60 S. Ct. 297.

Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below, 148 Pa. Super. Ct. 270, 271, 24 A. (2d) 717. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 79 L. ed. 1032, 55 S. Ct. 497, 101 A. L. R. 55. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in *Alabama v. King & Boozer*, 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 A. L. R. 615, supra; or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public

Works Administration project, upheld in *Baltimore & A. R. Co. v. Lichtenberg*, 176 Md. 383, 4 A. (2d) 734, supra; or the local building regulations applied to a contractor engaged in constructing a post-office building for the government, sustained in *James Stewart & Co. v. Sadrakula*, 309 U. S. 94, 84 L. ed. 596, 60 S. Ct. 431, 127 A. L. R. 821.

The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in co-ordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders. See *Metcalf & Eddy v. Mitchell*, supra (269 U. S. 523, 524, 70 L. ed. 392, 393, 46 S. Ct. 172). And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system. See *Graves v. New York*, 306 U. S. 466, 483, 487, 83 L. ed. 927, 934, 937, 59 S. Ct. 595, 120 A. L. R. 1466.

Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown

to be inconsistent with Congressional policy. Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require. *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, 312 U. S. 81, 85 L. ed. 595, 61 S. Ct. 485, and cases cited; *Colorado Nat. Bank v. Bedford*, 310 U. S. 41, 53, 84 L. ed. 1067, 1074, 60 S. Ct. 800, aand cases cited; cf. *Baltimore Nat. Bank v. State Tax Commission*, 297 U. S. 209, 80 L. ed. 586, 56 S. Ct. 417. Our inquiry here, therefore, must be whether the state's regulation of this contractor in a matter of local concern conflicts with Congressional legislation or with any discernible Congressional policy.

To establish such a conflict the government places its reliance on Acts of Congress requiring competitive bidding in the purchase of supplies for the Army. . . .

It is to be noted that while these statutes direct government officials to invite competitive bidding by contractors undertaking to furnish Army supplies, and also require them to accept the lowest responsible bid if any is accepted, they do not purport to set aside local price regulations or to prohibit the states from taking punitive measures for violations of such regulations. They are wholly consistent with the continued existence of such price regulations, and with the acceptance by government officers of the regulated price where that is the lowest bid, or the omission of competitive bidding in circumstances where local price regulations render it "impracticable to secure competition." Nor are we able to discern, in the language or legislative history of these or related statutes regulating government contracts, any indication that low cost was such a controlling consideration with Congress as to justify an inference that Congress intended

to displace state regulations affecting the price of articles purchased by the government. The reason for the passage of § 5 of the Act of March 3, 1809, has been said to be "to throw additional safeguards around this subject; to prevent favoritism, and to give to the United States the benefit of competition. . . ." 2 Ops. Atty. Gen. 257, 259.

We are not advised of any statute in which Congress has undertaken to set aside state laws affecting the price of goods supplied to the government in order to secure a lower price than would otherwise be obtainable. And Congress has often required the inclusion in government contracts of terms not directly related to the interests of the government as purchaser, which have the effect of increasing cost. Title III, § 2, of the Act of March 3, 1933, 47 Stat. 1489, 1520, c. 212, 41 U. S. C. A., §§ 10 (a)-10 (c), requires the use of American-produced goods on all public works contracts unless the head of the department finds that the use of such materials is "impracticable" or would "unreasonably increase the cost." The Eight Hour Law of August 1, 1892, 27 Stat. 340, c. 352, as amended, 40 U. S. C. A., §§ 321-326, limits to eight hours per day the work of persons employed by contractors with the government and requires all government contracts to include provisions to that effect. The Davis-Bacon Act of March 3, 1931, 46 Stat. 1494, c. 411, as amended, 40 U. S. C. A., § 276a, requires all contracts for public buildings to contain prevailing minimum wage provisions, and the Walsh-Healy Act (June 30, 1936), 49 Stat. 2036, c. 881, 41 U. S. C. A., § 35, requires the inclusion in all government contracts in excess of $10,000 of provisions requiring the contractor's adherence to prescribed minimum wages, maximum hours, restrictions on employment of child labor and requirements for safety of working conditions.

Evidence is wanting that Congress, in authorizing competitive bidding, has been so concerned with securing the lowest possible price for articles furnished to the government that it wished to set aside all local regulations affecting price. On the contrary, Congress has regarded the field of public contracts as one over which to exercise its supervisory legislative powers in safeguarding interests which may conflict with the needs of the government viewed solely as purchaser. An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication, *United States v. Borden*, 308 U. S. 188, 198, 199, 84 L. ed. 181, 190, 191, 60 S. Ct. 182; *United States v. Jackson*, 302 U. S. 628, 631, 82 L. ed. 488, 491, 58 S. Ct. 390; *Posadas v. National City Bank*, 296 U. S. 497, 503-505, 80 L. ed. 351, 355, 356, 56 S. Ct. 349, should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation.

Hence, in the absence of some evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable, we cannot say that the Pennsylvania milk regulation conflicts with Congressional legislation or policy and must be set aside merely because it increases the price of milk to the government. It would be no more than speculation for us to say that Congress would consider the government's pecuniary interest as a purchaser of milk more important than the interest asserted by Pennsylvania in the stabilization of her milk supply through control of price. Courts should

> guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.

The rationale of *Penn Dairies* is analogous to that expressed by this Court in numerous other decisions. The tax decisions are particularly helpful in placing in proper perspective the economic burden complained of by the United States in this case.

In *Alabama v. King & Boozer*[4] a contractor erected an Army camp for the United States under a cost-plus contract and this Court upheld a State sales tax on the sale of materials which was ultimately paid by the United States. This Court held that Federal government contractors are not immune from State taxation where the burden imposed is incidental and nondiscriminatory. The Court stated:

> So[5] far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted

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[4] (1941), 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43.

[5] Id., 314 U. S. 8, 1 par., 86 L. ed. 6, lower l. col.

no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v. Mississippi* and *Graves v. Texas Co., supra*, we think it no longer tenable. See *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 70 L. ed. 384, 46 S. Ct. 172; *Trinityfarm Constr. Co. v. Grosjean*, 291 U. S. 466, 78 L. ed. 918, 54 S. Ct. 469; *James v. Dravo Contracting Co.*, 302 U. S. 134, 160, 82 L. ed. 155, 172, 58 S. Ct. 208, 114 A. L. R. 318; *Helvering v. Gerhardt*, 304 U. S. 405, 416, 82 L. ed. 1427, 1434, 58 S. Ct. 969; *Graves v. New York*, 306 U. S. 466, 83 L. ed. 927, 59 S. Ct. 595, 120 A. L. R. 1466.

In repudiating the majority view expressed in *Panhandle*, this Court in effect adopted the dissents of Justices Holmes, Brandeis, Stone and McReynolds expressed therein. Justice Holmes dissented as follows:

> The[6] state of Mississippi in 1924 and 1926 imposed upon distributors and retail dealers of gasoline, for the privilege of engaging in the business, an excise tax of three cents and four cents respectively per gallon sold in the state. The supreme court of the state declares it to be a privilege tax but points out that whether this tax is on the privilege or on the property it is imposed before the gasoline has left the dealer's hands. The plaintiff in error, a dealer, was sued by the state for certain sums that were due under the statutes. It pleaded that the sales in respect of which the tax was demanded were sales to the United States for the use of its Coast Guard and Veterans' Hospital, that these being instrumentalities of the government it did not include the amount of the tax in the price charged, and that the statute did not and could not tax the dealer for them consistently

[6] *Panhandle Oil Co. v. Mississippi* (1927), 277 U. S. 218, 222, 1 par., 72 L. ed. 857, 859, 1 col., 3d par., 48 S. Ct. 451, 56 A. L. R. 583.

with the Constitution of the United States. The supreme court of the state upheld the tax and pointed out the extreme consequences to which a different decision might lead.

It seems to me that the state court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the states had any power it was assumed that they had all power, and that the necessary alternatives was to deny it altogether. But this court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this court sits. The power to fix rates is the power to destroy if unlimited, but this court while it endeavors to prevent confiscation does not prevent the fixing of rates. A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would be one. *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 162, 51 L. ed. 415, 423, 27 Sup. Ct. Rep. 188.

To come down more closely to the question before us, when the government comes into a state to purchase I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the state and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else. The cost of maintaining the state that makes the business possible is

just as necessary an element in the cost of production as labor or coal. If the plaintiff in error had paid the tax and had added it to the price the government would have had nothing to say. It could take the gasoline or leave it but it could not require the seller to abate his charge even if it had been arbitrarily increased in the hope of getting more from the government than could be got from the public at large. But in fact the government has not attempted to say anything in this case, which is simply that of a dealer trying to cut down a legitimate tax on his business because certain purchasers proposed to use the goods in a certain way, although so far as the sale was concerned they were free to turn the gasoline into the ocean, use it for private purposes or sell it again. It does not appear that the government would have refused to pay a price that included the tax if demanded, but if the government had refused it would not have exonerated the seller. *Pierce Oil Corp. v. Hopkins*, 264 U. S. 137, 139, 68 L. ed. 593, 596, 44 Sup. Ct. Rep. 251.

An imperfect analogy with taxation that affects interstate commerce is relied upon. Even the law on that subject has been liberalized since the decision of most of the cases cited. *Sonneborn Bros. v. Cureton (Sonneborn Bros. v. Keeling)*, 262 U. S. 506, 67 L. ed. 1095, 43 Sup. Ct. Rep. 643. But obviously it does not follow from the invalidity of a tax directly burdening interstate commerce that a tax upon a domestic seller is bad because he may be able to shift the burden to a purchaser, even though an agency of the government, who is willing to pay the price with the tax and who has no rational ground for demanding favor. I am not aware that the President, the Members of Congress, the Judiciary or, to come nearer to the case in hand, the Coast Guard or the officials of the

> Veterans' Hospital, because they are instrumentalities of government and cannot function naked and unfed, hitherto have been held entitled to have their bills for food and clothing cut down so far as their butchers and tailors have been taxed on their sales; and I had not supposed that the butchers and tailors could omit from their tax returns all receipts from the large class of customers to which I have referred. The question of interference with Government, I repeat, is one of reasonableness and degree and it seems to me that the interference in this case is too remote. *Metcalf v. Mitchell*, 269 U. S. 514, 70 L. ed. 384, 46 Sup. Ct. Rep. 172.

In *Graves v. New York*[7] this Court held that the imposition by a State of a non-discriminatory income tax in respect of the salary of an employee of a corporate instrumentality of the Federal government does not place an unconstitutional burden on the Federal government where the Congress has not conferred on the salaries of the employees of such instrumentality an immunity from State taxation. This Court, speaking through Justice Stone, stated as follows:[8]

> So much of the burden of a non-discriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitu-

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[7] (1939), 306 U. S. 466, 83 L. ed. 927, 59 S. Ct. 595, 120 A. L. R. 1466.

[8] Id., 306 U. S. 487, 1st par., 83 L. ed. 937, 1 col., 2d par.

tion presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments.

The rationale expressed in *Penn Dairies, King & Boozer* and *Graves* is reflected in the following decisions: *Trinity-farm Construction Co. v. Grosjean* (1934), 291 U. S. 466, 78 L. ed. 918, 54 S. Ct. 469 (Held that no unconstitutional taxation of means or instrumentalities of Federal government is involved in the imposition of a State excise tax on gasoline consumed by a contractor with the United States in the performance of a contract for the construction of levees.); *James v. Dravo Contracting Co.* (1937), 302 U. S. 134, 160, 82 L. ed. 155, 172, 58 S. Ct. 208, 114 A. L. R. 318 (Held that an occupation tax measured by gross income is not invalid where imposed by a State upon a contractor with the United States as laying a direct burden on the Federal Government, even though the imposition of the tax may increase the cost to the Government of the work contracted to be done); *Morgan Co. v. Arkansas for use of Phillips County* (1941), 202 Ark. 404, 150 S. W. 2d 736, app. dism. (1941), 314 U. S. 571, 86 L. ed. 463, 62 S. Ct. 77, reh. den. (1941), 314 U. S. 711, 86 L. ed. 567, 62 S. Ct. 175 (Held that a foreign corporation engaged in construction of a levee in Arkansas under Federal contract negotiated outside the State was not exempt from compliance with statutory requirements for doing business in the State of Arkansas); *Alward v. Johnson* (1931), 282 U. S. 509, 75 L. ed. 496 (Held that one having a contract to carry the mails is not immune as an agency of the Federal government from state taxation of property used in

the performance of such contract, even though the tax is based upon the gross receipts from his contract with the government); *Reconstruction Finance Corp. v. Menihan Corp.* (1941), 312 U. S. 81, 85 L. ed. 595 (Held that in conferring upon the RFC power to sue and to be sued, and in failing to endow it with the Federal government's immunity from liability for costs, Congress has indicated an intention to subject it to the liability of an unsuccessful litigant to costs and to the additional allowance made by courts of equity in accordance with equity practice); *Colorado National Bank of Denver v. Bedford* (1940), 310 U. S. 41, 84 L. ed. 1067 (Held that a state statute requiring a national banking corporation to collect and remit to the state the amount of a tax imposed upon the value of safe deposit box services rendered to its customers and allowing the bank a portion of the tax as compensation for the burden of collection, being a tax on customers and not upon the bank, does not impose an unconstitutional burden on a Federal instrumentality); *Trotter v. Tennessee* (1933), 290 U. S. 354, 78 L. ed. 358 (Held that the exemption from taxation of compensation paid by the United States to its disabled veterans and of disability benefits under a policy of war risk insurance, conferred by Federal statute, is lost when the money is converted into land and buildings); *James Stewart & Co. v. Sadrakula* (1940), 309 U. S. 94, 84 L. ed. 596 (Held that the provisions of a state labor law requiring contractors constructing buildings to board over all open steel tiers for the protection of their employees continue operative in territory over which the United States has acquired exclusive jurisdiction, and are applicable to a contractor constructing a post office therein); and *Susquehanna Power Co. v. State Tax Commission of Maryland* (1931), 283 U. S. 291, 75 L. ed. 1042 (Held that lands acquired by a licensee of the FPC for the construction of a dam in a navigable river, and used as a part of its licensed power project, are not within

the immunity from state taxation enjoyed by instrumentalities of the Federal government). See also: *Railway Mail Association v. Corsi* (1945), 326 U. S. 88, 89 L. ed. 2072; *Buckstaff Bath House Co. v. McKinley* (1939), 308 U. S. 358, 84 L. ed. 322; *Helvering v. Mountain Producers Corp.* (1938), 303 U. S. 376, 82 L. ed. 907; *Metcalf v. Mitchell* (1926), 269 U. S. 514, 70 L. ed. 384; *Commonwealth v. Closson* (1918), 229 Mass. 329, 118 N. E. 653, L. R. A. 1918C 929; *Railroad Co. v. Lichtenberg* (1939), 176 Md. 383, 4 A. 2d 734, app. dism. (1939), 308 U. S. 525, 84 L. ed. 444, 60 S. Ct. 297.

The tax decisions considered above imposed an enormous economic burden upon the United States. However, in each case the burden was upheld because its imposition was indiscriminate and incidental and, hence, did not contravene the implied immunity of the United States.

VII.

ANALYSIS OF PUBLIC UTILITIES AND KINDRED DECISIONS REVEAL THAT STATE ACTION CONTRAVENES THE IMPLIED IMMUNITY OF THE FEDERAL GOVERNMENT.

In *Public Utilities*[1] this Court held invalid under the supremacy clause of the Federal Constitution a California statute prohibiting carriers from transporting property owned by the Federal government at rates other than those approved by the California Public Utilities Commission on the ground that such statute interfered with the United States in performing its function of providing for the national defense.

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[1] *Public Utilities Commission of the State of California v. United States* (1958), 355 U. S. 534, 2 L. ed. 2d 470, 78 S. Ct. 446, reh. den. 356 U. S. 925, 2 L. ed. 2d 760, 78 S. Ct. 713.

In order to obtain the full impact of *Public Utilities*, we will begin this analysis by reviewing the relevant aspects of the opinion and judgment of the Three-Judge District Court[2] which was affirmed by this Court.

The District Court began its opinion with the following statement:

> "To[3] git thar fustest with the mostest men" was the recipe for victory announced by General Nathan Bedford Forrest, the Confederate cavalry leader.
>
> There is as much military wisdom in that dictum today as there was a century ago. In this atomic age, speed in the movement of men and supplies is still necessary.
>
> In the instant case, the theory of the plaintiff, as expressed in its complaint, is that if Section 530 of the Public Utilities Code of California, as amended in 1955, infra, hereinafter referred to as "Sec. 530", is held to apply to shipments made by the plaintiff, "it would greatly impede the discharge by the United States of its constitutional powers and responsibilities by inevitably causing delays in such shipments when time is of the essence and in many situations would expose to the public patterns of movement and traffic which would be subject to interpretation by the intelligence agents of foreign powers and might jeopardize the security of the United States."

The District Court reported Section 530 to read as follows:

> "Every[4] common carrier * * * may transport, free or at reduced rates: (a) *Persons* for the United

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[2] *United States v. Public Utilities Commission of the State of California* (D. C.—N. D. Cal.—1956), 141 F. Supp. 168.

[3] Id., 141 F. Supp. 170, r. col.

[4] Id., 141 F. Supp. 174, l. col.

> States, state, county, or municipal governments, or persons or property for charitable or patriotic purposes * * *. The commission may permit common carriers to transport property at reduced rates for the United States, state, county or municipal governments, *to such extent and subject to such conditions as it may consider just and reasonable*. Nothing herein shall prevent any common carrier subject to the provisions of this part from transporting property for the United States, state, county, or municipal governments, at reduced rates *no lower than rates which lawfully may be assessed and charged by any other such common carrier or by highway permit carriers* * * *" (California Stat., 1955, c. 1966). (Emphasis supplied).

The District Court questioned Section 530 in the following terms:

> May[5] a State statute *empower a* State Commission, however patriotic and well intentioned that Commission may be, to "permit common carriers to transport property at reduced rates for the United States, state, county or municipal governments, *to such extent and* SUBJECT *to such conditions as* IT *may consider just and reasonable*"? (Emphasis supplied)

and answered the question in the negative.

After giving a statement of the case and the pleadings therein, the District Court summarized the testimony.

The principal witness of the United States was Brigadier General Lasher who represented the Department of Defense.[6]

General Lasher explained the relationship between commodity and class rates as follows:

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[5] Id., 141 F. Supp. 171, 1. col., last par.

[6] Id., 141 F. Supp. 174, 1. col., last par.

"Well,[7] it's the law that carriers must—we will take the railroads—must be able to quote a rate to a prospective customer on any item from any point in the United States to any other point in the United States. It was apparently impossible to price each and every item of commerce. So these items of commerce were placed in about a dozen classes. However, it is quite obvious that there would be no movement of oranges from Maine to Florida, yet there is an applicable rate in these class rates.

"As commerce grew, industry spread out, it was necessary to afford industry a cost of movement more nearly geared to the requirements of that movement, so that the goods upon arrival at destination were not too costly for the consumer, and a system of commodity rates in lieu of class rates grew up.

"The commodity rate is a rate from a point of manufacture, let's say, to a point of distribution or consumption, which is based upon a volume move, based upon the facility of the manufacturer to get his goods to market, allowing him as much in the way of profit as possible and the carrier, too. So we find that commodity rates generally move commerce in the United States today. Class rates do not. As a matter of fact, they are popularly referred to as paper rates, rates which are on the books to satisfy the law."

General Lasher then described a war experience in Korea which illustrated the importance of logistics.[8] He concluded this description by stating that:

"Nothing[9] must be placed as an impediment to the complete flexibility and flow of movement of supplies

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[7] Id., 141 F. Supp. 175, lower 1 col.

[8] Id., 141 F. Supp. 175, r. col., 3d par.

[9] Id., 141 F. Supp. 176, l. col., 2d par.

to our troops in foreign theaters, whether it's in peace or in war."

In reply to a question regarding the effect that State regulation of rates for intrastate shipments of the Federal government's material "would have on the supply lines and logistical system of the United States,"[10] the General said:

> "Now,[11] then, for us to make these arrangements at the Washington level with the various states, let us say 48 states, with 48 varieties of methods to follow, we would find ourselves in an administrative *morass* out of which we would never fight our way. *We would never win the war!* Our negotiations for these arrangements, and I don't say just rates, but our negotiations for arrangements for the movement of traffic must be flexible; they must be direct with the parties in interest, *and they must be as secure as possible.*
>
> "We haven't touched on the security yet, but security is of primary importance to us * * *. Were we to spread * * * the record of the characteristics of our freight before the public and the parties at interest, we would seriously jeopardize that security, and in some cases be in violation of the law." . . .
>
> "There are many items which move today which are not described, some items which are willfully misdescribed in order to hide their identity, and they are moving in quantity. The only people who know what they are are about four. The carrier, whether he be a highway carrier or rail, usually doesn't know what he is carrying; but he has been told by one of his officials that that is what he will carry and the billing

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10 Id., 141 F. Supp. 176, l. col., 3d par.

11 Id., 141 F. Supp. 176, r. col., 1st par.

will be such and such and the security of that item is thereby maintained.

"Were we to have to go through a regulatory body, we would never be able to accomplish this."

The General added that State regulation of rates would tend to increase the freight bill of the Federal Government:

"Getting back to these class and commodity rates again, the procedure would be so cumbersome and so time-consuming that we would, in desperation, ship on the class-rate structure rather than wait for the procedures to be consummated and thereby increase considerably our transportation cost."

The District Court then related the testimony of another witness for the United States, Lieutenant Colonel Hall, who testified as to the complexity of having to segregate a large number of diverse items and rate each separately for shipment in intrastate commerce.[12] Colonel Hall then testified as to the security aspects of military shipments as follows:

On[13] the subject of required secrecy in certain cases, Colonel Hall stated that "really over a period of time *every military shipment is in a sense a security shipment.*"

"I had some experience in Europe in that situation," the Lieutenant Colonel explained. "A trained intelligence worker, espionage worker, can develop an amazing amount of accurate information just through looking at the records, say, for a month's time on our very prosaic shipments . . . shoes, medical supplies and food. Actually, a month's record of shipments

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[12] Id., 141 F. Supp. 178, l. col., 2d par.

[13] Id., 141 F. Supp. 179, lower l. col.

to an installation will indicate how many troops are there, the status of training of the troops, the status of their health and their overall motion as well as their ultimate destination."

Colonel Hall added that he did not think it would be possible to reveal the necessary data for logical and reasonable rate approval purpose in connection with many of the shipments that are secret in nature.

"If everything is to be made public, we might as well publish it in the newspapers," he declared.

Lieutenant Colonel Flanegan of the United States Army, another witness for the United States, emphasized the security aspect of military movements[14] and the unreasonable cost of class rates in comparison with commodity rates.[15]

Lieutenant Commander Bengtson of the United States Navy testified that delays caused by State regulation might be crucial for operational purposes in the Navy[16] and that such regulation would be detrimental to Navy security requirements.[17]

Colonel Chambers of the United States Air Force testified as follows:

> "I'd say 'definitely'," he explained, "because we —our logistics system is based on *speed* and we cannot tolerate anything that would interfere with speed. And, as I have pointed out previously, this Air Force

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[14] Id., 141 F. Supp. 179, lower r. col.

[15] Id., 141 F. Supp. 180, l. col., 2d par.

[16] Id., 141 F. Supp. 180, r. col., 2d par.

[17] Id., 141 F. Supp. 181, l. col., 2d par.

[18] Id., 141 F. Supp. 181, l. col., 5th par.

> mission is worldwide, and I think every one recognizes the importance that Strategic Air Command has played in present world affairs."
>
> Referring to "security-type shipments", Colonel Chambers testified that "we wouldn't want to reveal the number of shipments that do develop, nor the numbers (number?) of missiles that are involved or the points of origin and destination. We would certainly not * * * want to do it, and we would conceal that in so far as possible."

Lieutenant Colonel Eastham of the United States Marine Corps testified that the classification for rate purposes of many diverse items for shipment would slow down the movement of freight,[19] increase cost and interfere with secrecy.[20]

The District Court then briefly reviewed the testimony of witnesses appearing on behalf of the Public Utilities Commission and then went into an examination of the merits of the case.

The District Court distinguished *Penn Dairies* as follows:

> In[21] the first place, the State regulation imposed "no prohibition on the national government or its officers." They might "purchase milk from whom and at what price they (wished), without incurring any penalty". Here, however, as we have seen, there are penalties that could be imposed upon any officer of the United States who violates the provisions of the Public Utilities Act. Section 2112 provides:

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[19] Id., 141 F. Supp. 181, r. col., 2d par.

[20] Id., 141 F. Supp. 181, r. col., 4th par.

[21] Id., 141 F. Supp. 180, r. col., 1st par.

> "Every person who, either individually, or acting as an officer, agent, or employee of a corporation other than a public utility, violates any provision of this part, or fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or non-compliance, in a case in which a penalty has not otherwise been provided for such person, is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

But over and beyond this, the Penn case did not involve the procurement of the engines of war. There is a constitutional difference between a milk can and a hydrogen bomb!

The District Court concluded by finding that the United States presented evidence in abundance to substantiate its contentions,[22] and held that the United States was entitled to the relief sought by it.[23]

On appeal, this Court recognized that "The seriousness of the impact of California's regulation on the action of federal procurement officials is dramatically shown by this record."[24]

In affirming the judgment of the District Court, this Court carefully distinguished *Penn Dairies* and kindred decisions in the following manner:

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[22] Id., 141 F. Supp. 190, l. col., last par.

[23] Id., 141 F. Supp. 190, r. col., 2d par.

[24] *Public Utilities Commission v. United States* (1958), 355 U. S. 534, 544, 3d par., 2 L. ed. 2d 470, 478, l. col., 3d par., 78 S. Ct. 446.

We[25] lay to one side these cases which sustain nondiscriminatory state taxes on activities of contractors and others who do business for the United States, as their impact at most is to increase the costs of the operation. See, e. g., *Esso Standard Oil Co. v. Evans*, 345 U. S. 495, 97 L. ed. 1174, 73 S. Ct. 800; *Smith v. Davis*, 323 U. S. 111, 89 L. ed. 107, 65 S. Ct. 157; *Alabama v. King & Boozer*, 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 A. L. R. 615; *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208, 114 A. L. R. 318. We also need do no more than mention cases where, absent a conflicting federal regulation, a State seeks to impose safety or other requirements on a contractor who does business for the United States. See, e. g., *Baltimore & A. R. Co. v. Lichtenberg*, 176 Md. 383, 4 A. 2d 734, app. dism'd 308 U. S. 525, 84 L. ed. 444, 60 S. Ct. 297; *James Stewart & Co. v. Sadrakula*, 309 U. S. 94, 84 L. ed. 596, 60 S. Ct. 431, 127 A. L. R. 821; *Penn Dairies v. Milk Control Com.*, 318 U. S. 261, 87 L. ed. 748, 63 S. Ct. 617, can likewise be put to one side. There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation "imposes no prohibition on the national government or its officers." Id. 318 U. S. at 270. Here, however, the State places a prohibition on the Federal Government. Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear. The conflict is as plain as it was in *Arizona v. California*, 283 U. S. 423, 451, 75 L. ed. 1154, 1163, 51 S. Ct. 522, where a State sought authority over plans and specifications for a federal

[25] Id., 355 U. S. 543, 2d par., 2 L. ed. 477, 1. col., last par.

dam, in *Leslie Miller, Inc. v. Arkansas*, 352 U. S. 187, 1 L. ed. 2d 231, 77 S. Ct. 257, supra, where state standards regulating contractors conflicted with federal standards for those contractors, and in *Johnson v. Maryland*, 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16, where a State sought to exact a license requirement from a federal employee driving a mail truck. The conflict seems to us to be as clear as any that the Supremacy Clause, Art. 6, cl. 2, of the Constitution was designed to resolve.

Public Utilities apparently does not involve any change in doctrine by this Court because the following three Michigan cases were decided on the same day as *Public Utilities*.

In *United States v. City of Detroit*[26] this Court held that a state tax assessed against a private corporation engaged in business for profit based upon the value of realty owned by the United States and leased to the corporation under a lease permitting the corporation to deduct from the agreed rental any such taxes paid by it but reserving to the United States the right to contest the validity of such taxes, did not invade the constitutional immunity of Federal property from taxation by the States or discriminate against the United States or those with whom it deals. This Court further held that the Federal government's constitutional immunity does not shield private parties leasing Federally owned realty from State taxes imposed on them merely because part or all of the financial burden of the taxes eventually falls on the Federal government. This Court reached a similar conclusion in *United States v. Township of Muskegon*.[27] In *City of*

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[26] (1958), 355 U. S. 466, 2 L. ed. 2d 424, 78 S. Ct. 474

[27] (1958), 355 U. S. 484, 2 L. ed. 2d 436, 78 S. Ct. 483

Detroit v. Murray Corporation of America[28] this Court held that a State tax, based in part on the value of materials and work in process actually in the possession of a subcontractor but legal title to which has passed to the United States, did not infringe the Federal government's constitutional immunity from State taxation or discriminate against the Federal government, its property or those with whom it does business. This Court recognized that the Federal government will eventually feel the financial burden of at least some of such tax, but held that the imposition of an increased financial burden on the Federal government did not by itself invalidate a State tax.

The ratio decidendi of *Public Utilities* is consistent with that expressed in *Arizona v. California*[29] and *Johnson v. Maryland*.[30]

In *Arizona v. California* this Court held that the United States may perform its functions such as building a dam to improve navigation without obtaining approval of its plans and specifications as required by State statute. In *Johnson v. Maryland* this Court held that a State law requiring the operator of a mail truck to obtain a license as a condition to his right to drive it, in effect, to perform his job, was invalid when applied to government servants.

In *Public Utilities* this Court struck down State regulation of the movement of military supplies because such regulation directly interfered with the performance of the Federal function of providing for the national defense.

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[28] (1958), 355 U. S. 489, 2 L. ed. 2d 441, 460, 78 S. Ct. 458, 486.

[29] (1931), 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522.

[30] (1920), 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16.

These decisions show that a State's exercise of its police power contravenes the implied immunity of the Federal government if it regulates a matter solely within the sphere of Federal sovereignty, or if it interferes with the exercise of Federal functions by the Federal government itself or by its selected instrumentalities.

VIII.

PENN DAIRIES AND PUBLIC UTILITIES ARE IN HARMONY AND THE FACTS IN THIS CASE ARE GOVERNED BY PENN DAIRIES.

The doctrine evinced by *Penn Dairies*, *King & Boozer*, *Draco*, *Graves* and analogous decisions, demonstrate that an indiscriminate and incidental economic burden placed on the United States as a result of State regulation or taxation is not unconstitutional, provided there is no clear Congressional intent shown to immunize against such a burden. The Congressional immunization question is foreclosed in this case because the statutes considered herein are analogous to those construed by the Court in *Penn Dairies*. Under such circumstances, the amount of the economic burden is not a determining factor as is illustrated by the tax decisions which resulted in enormous economic burdens being placed on the United States.

But such burdens are fair. Justice Holmes in his dissent in *Panhandle* explained why when he stated: "It (United States) avails itself of the machinery furnished by the state and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else."

Georgia's scheme of regulating motor carrier transportation is similar to that adopted by the vast majority of her

sister States. The public interest sought to be served in such regulation "lies inter alia in providing safe and efficient transportation equipment; in the maintenance of adequate transportation facilities and service, regularly sustained in any specific territory or area; in providing specialized service essential for handling and delivering special types of merchandise or commodities; in the avoidance of undue and unnecessary travel and traffic congestion on the public highways; and in the maintenance of such reasonable rates and charges for the service as will give the shipper and the public using the commodity shipped the best possible economic advantage consistent with successful operation, taking into consideration in all these respects the natural advance in the quality of service in the field of transportation."[1] A significant purpose in all of such regulation is to secure adequate, sustained service for the public at the *lowest reasonable cost* without unjust discrimination or *destructive competitive practices*.[2]

When the United States avails itself of an intrastate transportation system regulated by a state, the United States should pay its fair share of the cost necessary to adequately maintain such a system. The theory of State

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[1] *Columbus-Cincinnati Trucking Company v. Public Utilities Commission* (1943), 141 Ohio St. 228, 47 N. E. 2d 623, 626 (6). See also: *Re Southern Pacific Motor Transport Company* (Cal. R. Com.—1928), P. U. R. 1929A. 193, 199, 2d par.; *Seaboard Air Line Ry. Co. v. Wells* (1930), 100 Fla. 1027, 130 So. 587, 591 (3), P. U. R. 1931A. 433; *Omaha Transit Company v. Briggs* (1959), 167 Neb. 703, 94 N. W. 2d 461, 467 (2), 28 P. U. R. 3d 26; *State v. Queen City Coach Company* (1951), 233 N. C. 119, 63 S. E. 2d 113, 115 (1); 88 P. U. R. N. S. 284; *Taylor-Edwards Warehouse & Transfer Co. v. Dept. of Public Service* (1945), 22 Wash. 2d 565, 569, 157 P. 2d 309, 310 (3), 58 P. U. R. N. S. 521; *Re United Parcel Service of Seattle* (Wash. Pub. Ser. Com.—1955), 12 P. U. R. 3d 22, 27 (2); 60 C. J. S., Motor Vehicles, Sec. 44 (b), p. 187.

[2] Id.

regulation of rates is to fix them at the lowest reasonable level necessary to maintain the economic stability of the industry regulated. The United States is the biggest spender in the nation. To permit the tremendous economic force to penetrate the rate floors established by state regulation would stimulate destructive competition in a regulated industry. The effect would be a heavy economic depressant operating on a national scale. Should such a result be readily inferred from congressional legislation? The Court has answered the question in the negative on numerous occasions.

The following words of the Court, spoken through Justice Frankfurter in *Palmer v. Massachusetts*,[3] are apposite here:

> "And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.
>
> To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted, as a matter of economic fact, a single organism and could

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3 (1939), 308 U. S. 79, 83, 2d par., 84 L. ed. 93, 97, r. col., 2d par.

not effectively be regulated as to some of its interstate phases without drawing local business within the regulated sphere. But such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress."

We should also note the following statement of the Court in *Davies Warehouse Company v. Bowles*:[4]

"Simplicity of administration is a merit that does not inhere in a federal system of government, as it is claimed to do in a unitary one. A federal system makes a merit, instead, of the very local autonomy in which complexities are inherent. Nor would the interpretation advocated by the Administrator avoid the necessity of ascertaining and considering rights thought to be possessed under local laws and not likely to be yielded readily. One effect of the Administrator's interpretation would be to postpone study of local laws from consideration in connection with wise administration to the time of litigation, as in this case. Local institutions, customs, and policies will not be overridden without fighting for consideration. The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation. At a time when

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[4] (1944), 321 U. S. 144, 153 (2), 88 L. ed. 635, 642, r. col., 2d par.

great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. It could never be more appropriate than now to heed the maxim reiterated recently by the Court that "the extension of federal control into these traditional local domains is a 'delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.'"

On the other hand, when the United States contracts for the services of a regulated industry and pays, as other purchasers, rates lawfully established by a state, the effect is to stimulate the national economy. The United States then contributes its fair share to the proper maintenance of the regulated industry which cannot afford to take less because of regulation. The result is consonant with the well recognized aims of Federal and State governments to maintain a vibrant national economy.

The latter philosophy of government is conducive to maintaining a strong commercial transportation industry in the United States. General Lasher emphasized the military necessity for such an industry when he testified that:

> "The[5] policy of the Department of Defense is to utilize the commercial transportation industry of the United States to the fullest extent possible."

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[5] *United States v. Public Utilities Commission of State of California* (D. C.—N. D. Cal.—1956), 141 F. Supp. 168, 174, r. col., 2d par.

> "This policy," the witness continued, "has been adopted primarily on the theory that the broader that common carrier base in the United States is, the better prepared transportationwise we will be in the case of emergency, and therefore we utilize military-owned transportation to a minimum extent and only where commercial transport cannot meet the requirements of the particular traffic involved."

In this case, as in *Penn Dairies*, the price regulation affects the United States only by increasing the price it pays. In *Penn Dairies* the Court recognized that the control of prices in the milk industry is clearly within the police power of the states since the public health is so directly affected. In this case, the regulation of rates in the intrastate transportation industry is also clearly within the police power of the states because the adequacy of the industry and its consequent ability to properly serve the general public is directly affected. The economic burden placed on the United States is only incidental to the enforcement of state milk and motor carrier regulations and the increased cost in each case is not one which was expressly made to discriminate against the United States, nor is it one which interferes with the performance of a Federal function.

The United States attempts to distinguish this case and *Penn Dairies* on the ground that in *Penn Dairies* the army could avoid state price regulation by procuring a supply of milk from outside the state, but that such an alternative is unavailable to the Federal government in this case.[8] Such a distinction is irrelevant because obviously it was not a determining factor in the Court's disposition of *Penn Dairies*.

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[8] Jurisdictional Statement, p. 15, lower portion.

In *Public Utilities*, the state had enacted legislation which directly regulated the United States, by name, when it should apply for reduced rates for the transportation of property. The state statute provided that "The (state) commission may permit common carriers to transport property at reduced rates for the United States . . ., to such extent and subject to such conditions as it may consider just and reasonable." The legal effect of such a statute is to place the United States under the heel of the state when applying for reduced rates. This direct interference by a state with the United States was relied on heavily in the decisions of the lower Court and this Court in *Public Utilities*.

By contrast, the Georgia statutes do not name the United States, but operate indiscriminately upon all shippers. The Georgia statutes do not interfere with the United States, but merely impose an indiscriminate incidental economic burden on it.

Next, we should note that in *Public Utilities* the property being transported consisted of military weapons and supplies. The District Court and this Court interpreted the State regulation as interfering seriously with the flexibility, speed and security requirements of moving military property. This is a crucial consideration during the current Cold War when espionage is being conducted in this Country by foreign powers. The opportunity for total war or limited conflict is ever present. Never in our history have the needs of immediate national defense been so synonymous with national survival. Such is the product of the thermonuclear and intercontinental ballistic missile age. Obviously, a State cannot interfere with the United States in the performance of its paramount responsibilities.

By contrast, this case involves the intrastate transportation of the household goods and personal effects of civilian

employees of the United States Department of Public Health. The movements here are remote from the considerations of national defense as compared with the military movements in *Public Utilities*. In this case, the national interest is more concerned with the maintenance of an economically sound commercial transportation system and its effect on the national economy and defense, than with the indiscriminate incidental economic burden placed on the United States. The District Court dramatically illustrated this distinction when it opined that "There is a constitutional difference between a milk can and a hydrogen bomb!"[7]

Furthermore, *Public Utilities* involved the transportation of substantial quantities of exotic military weapons and supplies for which no commodity rates had been devised. Consequently, under the California regulations such military property would have to move under the higher class rates. On the other hand, the vast majority of private property moves at commodity rates because such property involves the common articles of commerce for which commodity rates have been devised. Therefore, the effect of such rate classification by California would impose a substantial economic discrimination against the United States in comparison with private shippers because of the uniqueness of much of the military property transported.

By contrast, this case involves the transportation of household goods and personal effects which are frequent items of commerce throughout the Nation. Georgia, like all the States which regulate the rates for the transportation of property, has devised commodity rates. Conse-

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[7] *United States v. Public Utilities Commission of the State of California* (D. C.—N. D. Cal.—1956), 141 F. Supp. 168, 189, 1 col., 2d par.

quently, the economic burden imposed upon the United States is the same burden imposed upon private shippers.

The *Penn Dairies* doctrine is essential in preserving the vitality of our dual form of government, just as the *Public Utilities* doctrine is essential in prohibiting State interference with the performance of Federal functions. The two doctrines coexist under our Federal constitution. The over-expansion of either doctrine results in debilitating the desired vitality of the governmental victim.

In this case, the Court is called upon to determine which doctrine rules the facts presented. The answer of the Court, while directed to a Georgia factual situation, will have nationwide influence. Consequently, the question presented is one of degree and of balancing national interests.

On one side, we have the interest of preserving and stimulating the economy of the transportation industry which is an indispensable part of the national economy and defense. On the other side, we have an indiscriminate incidental economic burden imposed on the United States, as on other shippers, who avail themselves of an intrastate transportation system. The burden is merely the cost of supporting the system.

The Congressional intent, prior decisions of the Court and the national interest require that this case be ruled by the *Penn Dairies* doctrine.

IX.

CONCLUSION.

The Judgment of the United States District Court for the Northern District of Georgia, sought to be reviewed in this cause, should be affirmed on the ground that it is

manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Respectfully submitted,

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APPENDIX.

The following sections are extracted from the California Public Utilities Code:

§ 2107. Residuary penalty.—Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense (Stats. 1951, c. 764, p. 2098, § 2107).

§ 2110. Violation by officer, agent, or employee of public utility; misdemeanor; penalty.—Every officer, agent or employee of any public utility who violates or fails to comply with, or who procures, aids or abets any violation by any public utility of any provision of the Constitution of this State or of this part, or who fails to comply with any part of any order, decision, rule, direction, demand or requirement of the commission, or who procures, aids or abets any public utility in such violation or non-compliance in a case in which a penalty has not otherwise been provided for such officer, agent or employee is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment (Stats. 1951, c. 764, p. 2098, § 2110).

§ 2111. Penalty for violation by corporation not a public utility.—Every corporation, other than a public utility, which violates any provision of this part, or which fails to comply with any part of any order, deci-

sion, rule, direction, demand, or requirement, of the commission, in a case in which a penalty has not otherwise been provided for such corporation, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense (Stats. 1951, c. 764, p. 2099, § 2111).

§ 2112. Violation by officer, agent or employee of corporation not a public utility; misdemeanor; penalty.—Every person who, either individually or acting as an officer, agent or employee of a corporation other than a public utility, violates any provision of this part, or fails to comply with any part of any order, decision, rule, direction, demand or requirement of the commission, or who procures, aids or abets any public utility in such violation or non-compliance, in a case in which a penalty has not otherwise been provided for such person, is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment (Stats. 1951, c. 764, p. 2099, § 2112).